IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] C

AARON HENRY,

Petitioner,

v.

THE STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi, entered on July 12, 1963, in the above-entitled cause.

Opinion Below

The first opinion of the Supreme Court of Mississippi is reported at 154 So. 2d 289 and is appended hereto in Appendix A, *infra*, at page 1a. The second opinion of that court is not yet reported. It is set out in Appendix B, *infra*, at page 15a.

Jurisdiction

A judgment reversing peititioner's conviction by the Supreme Court of Mississippi was entered on June 3, 1963. Following a Suggestion of Error submitted by the Attorney General on June 12, 1963, a judgment affirming that conviction was entered on July 12, 1963. Both judg-

ments are appended hereto, *infra* at pages 14a and 28a-29a. Jurisdiction to review the judgment of the Supreme Court of Mississippi is granted to this Court under the provisions of Title 28, United States Code, Section 1257(3).

Questions Presented

1. Whether a criminal conviction, judicially determined to have been based solely upon evidence acquired as the result of an unreasonable search, violates petitioner's right to due process of law guaranteed by the Fourteenth Amendment where use of that evidence was objected to in a motion for directed verdict rather than a motion to strike?

2. Whether the conviction of petitioner by a court, whose jurisdiction is derivative and defective by reason of the absence of an original affidavit, offends the due process clause of the Fourteenth Amendment?

3. Whether the due process and equal protection clauses of the Fourteenth Amendment allow a state to use its criminal process, evidenced by the criminal conviction of petitioner unsupported by evidence of guilt, and its judicial process as a punitive measure against petitioner, and to enforce racial segregation and interfere with freedom of association.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 1832, Mississippi Code of 1942, Ann. Rec.:

> Practice in criminal cases—On affidavit of the commission of any crime of which he has jurisdiction lodged with a justice of the peace, he shall issue a warrant for the arrest of the offender returnable forthwith or on a certain day to be named and shall

issue subpoenas for witnesses as in civil cases, and shall try and dispose of the case according to law; and, on conviction, shall order such punishment to be inflicted as the law provides.

3. This case also involves Section 1205, Mississippi Code of 1942, Ann. Rec.:

Papers transmitted to circuit clerk—The justice of the peace, or mayor, or police court from whose judgment convicting of a criminal offense an appeal shall be taken, shall at once transmit to the clerk of the circuit court the bond taken by him and a certified copy of his record of the case, with all the original papers in the case, as in appeals in civil cases. If an appeal be taken from a judgment convicting of a criminal offense, during a session of the circuit court of the county, the transcript and papers shall be returned to, and the case triable at that term of the court, and the bond shall bind the defendant accordingly, and the clerk of the circuit court shall docket the case on the state docket, and shall be entitled to like fees as in other cases. The justice of the peace, mayor, or police justice shall be liable for the amount of the bond, if he fail to require a good and sufficient one. If the justice of the peace shall fail to make up his transcript of the record and transmit the same to the circuit clerk within ten days after the appeal-bond is given, the circuit court shall disallow his court costs in the case.

Statement

1. Prior Proceedings

Petitioner, a pharmacist and president of the Coahoma County Branch of the National Association for the Advancement of Colored People, resides in Clarksdale, Mississippi (R. 202). He was convicted by the County Court of Bolivar County, of disturbing the peace under Section 2089.5, Mississippi Code 1942, Ann. Rec. (R. 249). Petitioner appealed to the Circuit Court of Bolivar County

and then to the Supreme Court of Mississippi (R. 254; 259). The Supreme Court reversed on the ground that evidence necessary to sustain the conviction was obtained as the result of an illegal search, and remanded the case for a new trial (R. 269-289; 290). However, upon a Suggestion of Error filed by the State Attorney General, the Mississippi Supreme Court withdrew its decision and found instead that the petitioner had waived his rights to object to the illegally obtained evidence (R. 291-293; 327-340; 341). Petitioner prays that this Honorable Court issue a writ of certiorari to review the judgment against him.

2. The Evidence Presented

Petitioner was arrested on March 3, 1962, and taken into custody by the Chief of Police of Clarksdale, Coahoma County, Mississippi for an offense committed in Bolivar County, Mississippi (R. 120-121; 205-206). On March 14, 1962, petitioner was tried before a Justice of Peace, found guilty of disturbing the peace, fined $500 and sentenced to six months in jail (R. 2). An appeal was taken to the County Court of the Second Judicial District of Bolivar County, Mississippi, where trial *de novo* was held, resulting in petitioner's conviction for violation of Section 2089.5, Mississippi Code 1942, Ann. Rec. (R. 249). In both instances, trial was based upon an affidavit signed by the Bolivar County Prosecutor, neither on personal knowledge nor reflecting the complaint to be upon information and belief (R. 4). The Justice of the Peace before whom petitioner was tried certified to the County Court that all original papers in this action were attached to the record of proceedings before him as required by Section 1205, Mississippi Code of 1942, Ann. Rec. Certified as original papers were one cost bond, one appeal bond, eight subpoenas *duces tecum*, one capias and one general affidavit dated March 14, 1962 (R. 2).

The only testifying witness to the offense was complainant, Sterling Lee Eilert, who was 18 years of age at the time

of the offense and had quit school while in the tenth grade (R. 38-39). On March 3, 1962, he left his home in Memphis, Tennessee to "hitch-hike" to Cleveland, Mississippi (R. 22; 38-39; 40).

After three rides he arrived in Clarksdale and at about 5:30 p.m., a Negro gave him his next ride, south along Highway "61" (R. 24; 25). Eilert was, at all times, seated next to the car door. The driver volunteered to go past Alligator where he worked in a liquor store and on to Shelby (R. 65). As they came into Shelby, the driver allegedly reached across and "grabbed" [Eilert's] "crotch," touching his private parts (R. 33).

Eilert left the car, attempted a telephone call and walked to the Shelby police station (R. 34). Upon leaving the telephone booth, he saw what he judged to be the same car turn in a northerly direction, the direction of Clarksdale (R. 37; 57). Alligator and Clarksdale are in the same direction from Shelby. Eilert reported the incident to two police officers, one from Shelby and one from Clarksdale, describing the car as a "Star Chief," the upholstery as red and black, or red and brown, and the license plate as a prefix with the digits "1769" (R. 34; 96; 25). He described the driver to the police as an educated Negro, 5' 10" tall, heavy set, short hair, and well dressed, and that the driver was wearing either dark gray or dark brown slacks. In a prior statement to the police, Eilert described the driver as wearing a gray sport coat, dark or cream brown slacks, a solid colored sport shirt and no tie (R. 58; 69; 70; 199-200).

Policeman Charles Reynolds, a Clarksdale policeman who was then in Shelby, immediately concluded that Aaron Henry was the man (R. 109). He testified that he knew petitioner in connection with his activities in the N.A.A.C.P. (R. 109). Eilert confirmed this fact and testified that the police officers "knew who I was talking about right away" and "said he was associated with the N.A.A.C.P. or something" (R. 200).

The partial license number reported by Eilert was issued by 82 counties in Mississippi, each identified by a different prefix (R. 90). The officers checked only Coahoma County, the county in which Clarksdale was located, and the partial number was matched with that of petitioner's car (R. 91).

All the foregoing activities, including a 20-mile drive from Clarksdale, through towns and at a speed no faster than 40-45 m.p.h., had, accordingly, transpired in approximately 25 minutes, from 5:30 to 5:56 p.m. (R. 47; 48; 200; 166).

Eilert was then driven to the Clarksdale police station where he gave another statement, tape recorded by Coahoma County Prosecutor Pearson (R. 60). Meanwhile, a warrant was issued for petitioner's arrest (R. 97). Shortly before 7:00 p.m., petitioner was awakened from sleep, arrested at his home and brought to the Clarksdale police station by Clarksdale's Chief of Police (R. 120; 205). The warrant gave as the cause "misconduct in Mound Bayou" (R. 206), a town south of Shelby, which is, in turn, south of Clarksdale. Another warrant appeared in the County Court proceedings and the original was never produced, although demanded by the petitioner (R. 75; 214; 215).

Petitioner was the only person presented to Eilert for identification and was so identified (R. 61). Eilert further testified that at the police station, petitioner was wearing dark trousers, a gold cardigan sweater and a white shirt open at the collar, and that these clothes were the same as the driver of the car had been wearing (R. 67-68).

Later that evening, the Police Chief and the arresting officers returned to the Henry house, obtained the keys to his car from his wife and entered the car. The Police Chief testified that the cigarette lighter was inoperative and that "dentyne" chewing gum wrappers were found in the ash tray at the right hand side of the dashboard (R. 127). At some point in the evening after Eilert gave his second

statement, he "remembered" that the cigarette lighter in the car in question did not work and the ash tray at the right end of the dashboard had "dentyne" chewing gum wrappers (R. 70). This information was not a part of his previous statement to the police (R. 70-71), and Eilert, in describing the gum wrappers, did not mention any brand name (R. 112).

Petitioner gave a voluntary statement to the police at the time of his arrest, consistent with his testimony at trial (R. 124). He is a pharmacist, has been such since 1950, is married and has an 11-year old daughter (R. 202). On March 3, 1962, he was at his Clarksdale drug store where he worked between 3 and 4:45 in the afternoon (R. 203). He then went to the Delta Burial Corporation office in Clarksdale and stayed there talking with friends until 5:30, when he went home (R. 203). Before leaving the drug store, he put on a black coat and wore it with navy trousers (R. 210). He arrived at home five or ten minutes later, had dinner and went to bed before a board meeting scheduled for 7:30 that evening. Shortly before seven, he was arrested (R. 204-205).

Ministers and educators testified to the petitioner's good moral character and petitioner testified, without contradiction, that he had normal domestic relations with his wife and daughter, and was without any homosexual tendencies (R. 210; 219-225).

Petitioner's presence in Clarksdale between 4:45 p.m. and 7:00 p.m., the time of his arrest, was established by six witnesses. Between 4:45 and 5:00 p.m. he was at the Delta funeral home engaged in conversation with three of those witnesses (R. 146; 148; 150; 152; 158; 167). He reached his home, wearing navy or black trousers and dress coat and a tie, at approximately 5:30 p.m., where he talked to two other witnesses and to his wife and daughter. Petitioner did not leave his home until the time of his arrest (R. 147; 149; 150-151; 152-156; 160; 165; 168-170; 188; 204).

3. Procedure Below: Preservation of Federal Questions.

Prior to trial petitioner moved to quash the affidavit or alternatively for dismissal, on the ground that the affidavit was defective, not properly executed on personal knowledge and that the court was without jurisdiction (R. 14-16). Petitioner also moved for issuance of subpoenas *duces tecum* requiring production of the school records of the complaining witness, the auto registration records of Coahoma County for the year 1961-1962 and all original papers in the cause (R. 5-6; 7-8; 87). All motions were denied (R. 9; 16; 87). The court ruled that exceptions were unnecessary (R. 88).

After testimony concerning a prior affidavit, petitioner moved to have that affidavit produced. The County Attorney stated he did not have it and did not know where it was, whereupon petitioner again moved for dismissal urging that the court was bound by the record from the court below and that both the Justice of the Peace Court and the trial court lacked jurisdiction, and that petitioner was being deprived of due process of law (R. 82-85). That motion was denied and the same objections were made a part of a motion for directed verdict and a motion for new trial (R. 144-145; 250-251). All motions were overruled (R. 146; 252).

At the termination of the State's case, petitioner moved for a directed verdict, urging as grounds, commission of an illegal search and seizure, a violation of petitioner's rights under the Fourteenth Amendment and failure to prove the case beyond a reasonable doubt (R. 144-145). This motion was denied (R. 146).

Following the close of petitioner's case, he attempted to renew his motion for dismissal. That motion was overruled before it could be stated in full (R. 227).

After entry of judgment of conviction, petitioner moved to set aside the verdict or for a new trial charging failure

to direct a verdict at the end of the State's case, failure to direct a verdict at the end of petitioner's case, that the verdict of the jury was against the overwhelming weight of evidence, that the conviction of petitioner was a denial of rights secured by the due process clause of the Fourteenth Amendment and that the conviction deprived petitioner of his liberty and property without due process of law, denied him equal protection of the laws and abridged his privileges and immunities as a citizen, all in violation of the Fourteenth Amendment to the United States Constitution and Section 14 of the Mississippi Constitution (R. 250-251). The motion for new trial was overruled (R. 252).

Assignments of Error were filed in the Circuit Court and Supreme Court of Mississippi preserving all objections raised below. Only the Assignment of Error filed in the Mississippi Supreme Court appears in the record (R. 267-268).

The Supreme Court of Mississippi did not, in either of its opinions, specifically rule on federal questions presented; it denied all points on the basis of the Constitution of the State of Mississippi.

REASONS FOR ALLOWANCE OF THE WRIT

I

A criminal conviction, which rests upon evidence, judicially determined to have been obtained in violation of petitioner's constitutional rights and to be the sole support of the conviction, offends the due process clause of the Fourteenth Amendment and is in conflict with principles announced by this Court.

The decision below which sustains a criminal conviction found to be supported only by evidence obtained in violation of petitioner's constitutional rights, is in conflict with the *ratio decidendi of Brown* v. *Mississippi*, 297 U. S.

278, and with the principles enunciated in *Weeks* v. *United States*, 232 U. S. 383, *Wolf* v. *Colorado*, 338 U. S. 25 and *Mapp* v. *Ohio*, 367 U. S. 643.

Both the Fourth Amendment's guarantee against unreasonable search and seizure and that of the Fifth Amendment against compulsory self-incrimination are included in that basic due process of law required by the Fourteenth Amendment. *Wolf* v. *Colorado*, *supra*; *Brown* v. *Mississippi*, *supra*. These fundamental rights are liberally construed to insure the security of the individual against oppressive police tactics and this Court has been vigilant to condemn invasions of privacy by police officials anxious to obtain convictions without regard for encroachments upon personal liberties. *Boyd* v. *United States*, 116 U. S. 616; *Elkins* v. *United States*, 364 U. S. 206; *Agnello* v. *United States*, 269 U. S. 20, and *Segurola* v. *United States*, 275 U. S. 106.

In *Brown* v. *Mississippi*, *supra*, this Court recognized the primacy of preventing invasions of constitutional rights and held that although no objection was made, the trial court, on its own motion, must exclude evidence obtained in violation of rights, so fundamental as to be a part of the due process clause of the United States Constitution. Failure to exclude that evidence required reversal for want of the essential elements of due process. Failure of the State Supreme Court, before whom the federal question was raised, to enforce the petitioner's constitutional rights, was a denial of a federal right requiring reversal of the judgment.

Although the *Brown* case concerned a coerced confession obtained in violation of the Fourth Amendment's proscription in a capital case, its rationale, that preservation of basic constitutional rights rises above rules of procedure and requires that a fair and impartial trial be granted, is here applicable in view of the decision in *Mapp* v. *Ohio*, *supra*.

In *Wolf* v. *Colorado, supra,* this Court, in recognition of the fundamental nature of the rights protected by the federal constitution's proscription against unreasonable search and seizure, held that clause to act through and to be a part of the due process clause of the Fourteenth Amendment, but did not require States to exclude the use of evidence so acquired. The dilemma resulting from the principle enunciated in the *Wolf* case, and the determination in *Weeks* v. *United States, supra* that the Fourth Amendment barred the use, in federal courts, of illegally acquired evidence, was resolved in *Mapp* v. *Ohio, supra.*

In the *Mapp* case, this Court recognized that the security of freedom from unreasonable search and seizure was so fundamental as to require the State to exclude evidence so acquired. " . . . [T]he very least that together they [the Fourth and Fifth Amendments] assure in either sphere is that no man is to be convicted on unconstitutional evidence."

Thus, the *Mapp* case removed the final impediment to the application of the *ratio decidendi* of *Brown* v. *Mississippi* to the use of evidence, acquired as a result of an illegal search.

The Mississippi Supreme Court held that evidence, unlawfully obtained by an illegal search of petitioner's car (R. 282; 335), was essential to sustain the conviction of petitioner but, despite his having objected to the use of the evidence in a motion for directed verdict, timely objection was not made and error could not be predicated on the court's failure to exclude that evidence.

In this determination, the Mississippi Supreme Court acted contrary to its own decisions in which it has enunciated a strong state policy against convictions resting on illegally obtained evidence and which require a court, on its own motion, to strike that evidence. *Hartfield* v. *State*, 48 So. 2d 507; *Tucker* v. *State*, 90 So. 845; *Brooks* v. *State*, 46 So. 2d 94.

This is not a case where a determination of waiver is based upon a complete failure to object. Petitioner's motion for directed verdict raised the issue. Waiver of constitutional rights is not lightly inferred. *Hodges* v. *Easton*, 106 U. S. 408, 412; *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Smith* v. *United States*, 337 U. S. 137, 150; *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 395; *Ohio Bell Tel. Co.* v. *Commission*, 301 U. S. 292, 306. Courts will indulge every reasonable presumption against such a waiver. *Emspak* v. *United States*, 349 U. S. 190; *Smith* v. *United States, supra; Johnson* v. *Zerbst, supra.*

The test then is not one of procedure, based upon the time of an objection, but whether admission of illegally obtained evidence so affected the judicial proceedings as to deny fundamental fairness and to inject into those proceedings such prejudice as to deny due process of law.

Mississippi's constitutional provision concerning illegal search and seizure is consistent with the federal provision. The court below found that an unreasonable and illegal search had taken place, that the evidence so secured was crucial to the State's case, that without such evidence the conviction could not stand, and that submission of the evidence prevented petitioner "from obtaining a fair trial, as guaranteed to all persons in courts of Mississippi." (R. 288)[1] For the same reasons, that evidence prevented petitioner from obtaining a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution. Rules of practice must not be allowed to prevail over constitutional rights for technical reasons. *Gouled*

[1] Those decisions sought to support its rejection of those findings in its second opinion (R. 337) are inapposite to the case at bar and deal with failures to object which prevented the conduct of a preliminary hearing to determine probable cause for the issuance of a search warrant, *McNutt* v. *State*, 108 So. 721; *Harris* v. *State*, 120 So. 206; *Loftin* v. *State*, 116 So. 435; *Holmes* v. *State*, 111 So. 860; *Carr* v. *State*, 192 So. 569, or situations where illegality in obtaining the evidence was not conceded. *Williams* v. *State*, 157 So. 717, *Wright* v. *State*, 54 So. 2d 735.

v. *United States*, 255 U. S. 298. Nor may the State prosecute by the use of methods which offend justice. See *Rochin* v. *California*, 342 U. S. 165.

Considering the decisive character of the evidence, it was incumbent upon the trial court to prevent conviction based upon unconstitutional evidence by excluding the evidence or granting the motion. As in *Brown* v. *Mississippi*, *supra*, the trial court ". . . proceeded to permit conviction and to pronounce sentence," and thereby deviated from its basic responsibility mandated by the federal Constitution.

The illegally acquired evidence in the case at bar so seriously affected the fairness of proceedings as to prejudice petitioner's substantial rights. The record is barren of unrelated evidence sufficient to sustain a conviction. Use of the evidence was error of sufficient magnitude as to deprive petitioner of substantial justice.

It is the fact that objection to use of the evidence was voiced and not the timing of that objection which must be controlling, particularly in view of Rule 40(1)(d)(2), which empowers this Court to notice plain error whether or not it has been properly raised, and although it is neither assigned nor specified. *Silber* v. *United States*, 370 U. S. 717; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395; *United States* v. *Atkinson*, 297 U. S. 157. That the conviction below is for a misdemeanor does not mitigate against the importance of the issues raised herein. It is the denial of the fundamental right and not the severity of the unconstitutionally imposed penalty that must govern consideration of this petition. *Kinsella* v. *United States*, 361 U. S. 234, cf. *Gideon* v. *Wainwright*, 372 U. S. 335. Preservation of the right here involved is so essential to the concepts of justice, that conviction, solely supported by tainted evidence denies to petitioner that fundamental fairness legal process must provide. This Court's holding in *Mapp* v. *Ohio*, *supra*, renders the issue raised herein of sufficient magnitude to require vacation of the judgment below.

II

Conviction by a court lacking jurisdiction is a fundamental denial of rights guaranteed by the Fourteenth Amendment, and conflicts with principles announced by this Court.

By affirming the conviction of petitioner, the Supreme Court of Mississippi, perpetuated the error of the trial court which conducted proceedings to judgment and sentence despite its lack of jurisdiction. It is fundamental law, that the Due Process Clause of the Fourteenth Amendment requires a criminal trial by a court of competent jurisdiction. *Frank* v. *Mangum*, 237 U. S. 309, 326; *Devine* v. *Hand*, 287 F. 2d 687 (10th Cir. 1961); *Odell* v. *Hudspeth*, 189 F. 2d 300 (10th Cir. 1951); *Alexander* v. *Daugherty*, 286 F. 2d 645 (10th Cir. 1961).

Lack of an affidavit, the foundation of jurisdiction of the Justice of the Peace before whom petitioner was tried initially, rendered all subsequent proceedings void *ab initio*. Trial *de novo* in the County Court and the resulting judgment of conviction denied to petitioner that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The *sine qua non* of the Justice of the Peace's authority is set forth in Section 1832 of the Mississippi Code of 1942, Ann. Rec. which provides:

> Practice in criminal cases—On affidavit of the commission of any crime of which he has jurisdiction lodged with a justice of the peace, he shall issue a warrant for the arrest of any offender returnable forthwith or on a certain day to be named, and shall issue subpoenas for witnesses as in civil cases, and shall try and dispose of the case according to law; and, on conviction, shall order such punishment to be inflicted as the law provides.

Petitioner was arrested on March 3, 1962, for an offense allegedly committed on that same date. Certified to the County Court of Bolivar County as original papers constituting the record of proceedings before the Justice of the Peace, was an affidavit dated March 14, 1962, sworn to by the Bolivar County Prosecutor which was neither upon personal knowledge nor upon information and belief. That affidavit was certified as one of the original papers in this cause as required by Section 1205, Mississippi Code of 1942, Ann. Rec. (R. 2-4; 72). Although not attacked at the hearing before the Justice of the Peace, the affidavit imports jurisdiction and the law of Mississippi provides that defective jurisdiction properly may be raised at any point in the proceedings. See *Ivy* v. *State*, 106 So. 111; *Dorsey* v. *State*, 106 So. 827; *Pickle* v. *State*, 102 So. 4; *Sandifer* v. *State*, 101 So. 862; *Sullivan* v. *State*, 101 So. 683; *Slaton* v. *State*, 98 So. 838; *Norwood* v. *State*, 93 So. 354; *Quillen* v. *State*, 64 So. 736; *Cagle* v. *State*, 63 So. 672.

The State's contention that the affidavit certified to the County Court as a part of the record below was an amended affidavit is unsupported by any testimony. Moreover, the affidavit speaks for itself and does not reflect any amendment. Although the court below concerned itself with the liberality of amendments in Mississippi practice, the record is devoid of any competent testimony that such an amendment was, in fact, made. A determination that an amendment was made is based upon speculation alone (R. 84, 75).[2]

Although existence of an original affidavit was attempted to be supplied by oral evidence (R. 80-81), and conceding *arguendo*, that it may be so supplied, the trial court and the court below are, as set forth in the opinion of the Su-

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[2] Those statutory sections which were relied upon by the court below, specifically have reference to proceedings in the circuit courts and not before a Justice of the Peace.

preme Court of Mississippi, bound by the certified transcript filed by the Justice of the Peace. The rule adopted by the court below and set forth in its opinion (R. 333) provides:

> . . . where properly authenticated or certified records have been filed on appeal, they import absolute verity, and the record is the sole, conclusive and unimpeachable evidence of the proceedings in the court below. If the record is incomplete or incorrect, amendment, or correction, must be sought by appropriate proceedings. The record cannot be impeached collaterally by oral testimony or extrinsic evidence *aliunde* the record. 4A C. J. S., Appeal and Error, Sec. 1143, p. 1201, *et seq.* See also, 31 Am. Jur., Justices of the Peace, Sec. 126, p. 285.

Thus the court below acknowledged this rule to be binding upon it. Consistent therewith, any alleged amendment of an affidavit certified as a part of the record must be reflected in that record and cannot be supplied by evidence *aliunde* that record.

Wittington v. *State*, 67 So. 2d 515, cited by the court below is consistent with the requirements of Section 1617 of the Mississippi Code of 1942, Ann. Rec. which provide that failure to question an improperly certified record of a Justice of the Peace in the county court constitutes waiver of that question. *Wittington* held that failure to object to the transcript of record below, during or before trial *de novo*, raised a conclusive presumption that the record was in compliance with the law. This ruling is binding on the State. The *Wittington* case is equally immaterial to the points raised herein and before the court below inasmuch as petitioner does not urge an "improperly certified" record.

Legal prosecution begins with an affidavit charging a crime. *Ratcliff* v. *State*, 26 So. 2d 69. Inclusion in the record of proceedings before the Justice of the Peace, of the affidavit of the Bolivar County Prosecutor executed on

March 14, 1962, forecloses the issue of the filing of a previous affidavit sufficient to invoke the jurisdiction of the Justice of the Peace on March 3, 1962, the day of petitioner's arrest. That arrest is thereby rendered unconstitutional See *King* v. *Gokey*, 32 F. 2d 793 (N. D. N. Y. 1929); *United States* v. *Langsdale*, 115 F. Supp. 489 (W. D. Mo. 1953)[3] as are all subsequent proceedings based on the record. By virtue of the Justice of the Peace's lack of jurisdiction, none could be imparted to the County Court on appeal. *Smith* v. *State*, 24 So. 2d 85; *Powell* v. *State*, 17 So. 2d 524.

This point was repeatedly urged before the County Court, (R. 14-16; 82-86; 144-145; 196; 227; 250) which further prejudiced petitioner's rights by declining to authorize issuance of a subpoena *duces tecum* directed to all original papers in the cause (R. 87). Failure to grant petitioner's motion for the subpoena successfully thwarted efforts which if successful, would have clarified those issues seized upon by the court below to support its decision. The absence of an affidavit executed on March 3, 1962, results in a jurisdictional defect, irreparable on the appeal to the County Court. *Smith* v. *State, supra; Powell* v. *State, supra.* Conviction, in the absence of a valid affidavit, is an unconstitutional denial of due process. *Bramlette* v. *State*, 8 So. 2d, 234; *Frank* v. *Mangum, supra.*

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[3] See *Giordenello* v. *United States*, 357 U. S. 480, where this Court found that in the absence of an indictment reflecting the grand jury's finding of probable cause, which indictment is sufficient to validate issuance of an arrest warrant, "the issue of probable cause had to be determined by the Commissioner; and an adequate basis for such a finding had to appear on the face of the complaint."

III

The State of Mississippi has used its criminal and judicial process as a punitive measure, to enforce racial segregation and to interfere with freedom of association in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Implicit in this case are grave issues, public importance of which is illuminated by the atmosphere in which they arise. These issues are not minimized by the involvement of a misdemeanor. Initially, the conviction below was rendered by a court lacking jurisdiction and rests, in its entirety, upon unconstitutionally acquired evidence. Both errors are severe enough to warrant reversal by this Court.

Section 2089.5, Mississippi Code of 1942, Ann. Rec., the offense with which petitioner was charged, is one of a group of "segregation laws" passed by the legislature as a part of the State's massive resistance program to the school desegregation decision. See *Bailey* v. *Patterson*, 199 F. Supp. 595, 603-608 (S. D. Miss. 1961). The policy and practice of racial segregation in Mississippi is so explicit and notorious as to be subject to judicial notice. See *United States* v. *City of Jackson*, 318 F. 2d 1, (5th Cir. 1963); *Bailey* v. *Patterson* — F. 2d — (#20372, Decided Sept. 24, 1963); *Meridith* v. *Fair*, 298 F. 2d 696 (5th Cir. 1962), *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (5th Cir. 1959).

The failure of unequivocal actions of the state enforcing racial segregation to survive legal attacks has resulted in a plethora of decisions, sufficient to discourage more obvious means to compel conformity with southern custom and tradition. *Gayle* v. *Browder*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U. S. 903; *Evers* v. *Dwyer*, 358 U. S. 202; *Mayor & Council of Baltimore* v. *Dawson*, 350 U. S. 877; *Buchanan* v. *Warley*, 245 U. S. 60; *State Athletic Commis-*

sion v. *Dorsey*, 359 U. S. 533. Similarly, disguised methods for enforcement of segregation have been invalidated. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *City of Memphis*, 369 U. S. 350. As a result, maintenance of the racial status quo is sought by more subtle methods, under the guise of preservation of law and order. *Peterson* v. *City of Greenville*, 373 U. S. 244; *Lombard* v. *Louisiana*, 373 U. S. 257; *Garner* v. *Louisiana*, 368 U. S. 157.

Petitioner, a resident of Clarksdale, Mississippi, is the President of the Coahoma County Branch of the National Association for the Advancement of Colored People and President of its State Conference of Branches. In those capacities and as an individual, he advocates full civil rights for Negroes in Mississippi and participates in activities purposed to secure those rights.

In 1955, shortly after the decision in *Brown* v. *Board of Education*, 347 U. S. 483, petitioner, together with several hundred other Negro citizens petitioned for desegregation of the Clarksdale public schools. Names of subscribers were published in the local newspaper and withdrawals were effected through intimidation and economic reprisal. Supporters of the petition dwindled from over 400 to approximately 70. Since that time, and continuing to date, petitioner has been plagued with abusive telephone calls, threatening his life and those of his family.

In 1961, during the period of the "Freedom Rides," students attempted to use the railroad waiting room and restaurant facilities in Clarksdale on a desegregated basis. Although petitioner was not among those students, following their arrest he was summoned to the office of Coahoma County Prosecutor Thomas Pearson for questioning regarding his attempts to "disturb" existing "race relations".

In January, 1962, petitioner was summoned to the office of the Coahoma County Prosecutor to discuss with the

Prosecutor and Chief of Police of Clarksdale an alleged boycott being conducted by the Negro community in Clarksdale. Following that conference, petitioner was arrested upon the complaint of the Prosecutor for conspiracy to commit acts in restraint of trade, a violation of Section 2056(6) of the Mississippi Code of 1942, Ann. Rec. The resulting case, *State* v. *Henry*, No. 5245, is now pending, after remand, in the County Court of Coahoma County.

In March, 1962, the events set forth in the statement of this case occurred. Subsequent to his arrest, petitioner publicly denied involvement in these charges and stated those charges to have been "borne in the minds of" Clarksdale's "Chief of Police," Benford "Collins and" Coahoma "County Prosecutor," Thomas "Pearson." The latter individuals commenced libel suits against petitioner, and demanded and received jury awards in the sum of $15,000 and $25,000 respectively for alleged damage to their reputations. Cases entitled *Collins* v. *Henry* and *Pearson* v. *Henry* are now pending before the Supreme Court of Mississippi.

At the conclusion of the 1961-1962 school term, employment of petitioner's wife as a teacher was terminated despite favorable recommendations by her supervisors. The validity of her discharge is the subject matter of *Noelle Henry* v. *Coahoma County Board of Education*, Civ. No. D-C-43-62, now pending before the United States District Court for the Northern District of Mississippi.

In March of 1963, petitioner's home was bombed and damaged by the explosion and ensuing fire. Confessions were obtained from two individuals. One was tried for the crime of arson and acquitted by a jury. The case against the second was then "nolle prossed." The District Attorney who presented the State's case against the confessed arsonist complained, in open court, that his assistant, County Prosecutor Pearson, had attempted to persuade a witness not to testify against the arsonist, because, in Pearson's opinion petitioner was of no value to

either the Negro or the white community and no white person should testify for him (*State* v. *Theodore Carr*).

In June 1963, petitioner was arrested while attempting to picket the Clarksdale City Hall to protest enforced racial segregation and to petition for redress of his grievances. Petitioner was charged and found guilty of "parading without a permit." That case is now pending on appeal for a trial *de novo* before the Coahoma County Court.

Subsequent to the bombing of his home, petitioner was unable to acquire adequate police protection and hired a private watchman to guard his residence during the nights. Previously, he had requested and acquired a permit for the possession of a revolver. On July 30, 1963, during the night, Clarksdale Police Chief Collins stopped his patrol car in front of petitioner's home and summoned the watchman who was then upon petitioner's property. The watchman left the revolver on the front seat of an automobile parked in the driveway, conversed with police officials and was then arrested for possession of a concealed weapon. The revolver was confiscated by the police officials.

In the case at bar, the State has resorted to the use of criminal process, a practice without novelty in the State of Mississippi. Prior to his admission to the State University, James Meridith was charged with misrepresenting his residence in registering to vote. (See *Meridith* v. *Fair*, 305 F. 2d 343, 355-56). Prior applicants to the University have been charged with reckless driving and possession of alcoholic beverages or committed to a state mental institution.[4] See also *Dian Hudson* v. *Leake County School Board*. Civ. No. 3382, United States District Court for the Southern District of Mississippi, where an order for a citation of contempt of court issued against an attorney for plaintiffs seeking to desegregate public schools, after one

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[4] Vol. 7, No. 9 **Southern School News**, March 1961; Vol. 5, No. 1 **Southern School News**, July 1958.

plaintiff denied having authorized counsel to act for her. The citation was dismissed, after extended proceedings, in August, 1963, with a severe opinion and upon order of the court requiring the attorney to pay court costs. Of the four Negro and thousands of white attorneys licensed to practice in the State of Mississippi only three of the Negro attorneys will handle civil rights actions. Previously, one white attorney participated in these cases. In February, 1961, he filed an action attacking the payment of State funds to white Citizens Councils. In February, 1963, he filed suit for admission of a Negro into the University of Mississippi. Within hours of filing that suit, the attorney was arrested on a morals charge concerning a male minor. The attorney left the State and did not contest the charge[5]. Variation in approach does not obscure purpose.

As early as *Nixon* v. *Condon*, 286 U. S. 73, this Court recognized and struck down indirect means to deny constitutional rights. In *Cooper* v. *Aaron*, 358 U. S. 1, this Court condemned covert techniques to effectuate segregation, attempted "ingeniously or ingenuously." The record reflects that involvement of petitioner in this cause, was prompted by a police official with knowledge of petitioner by virtue of his civil rights activities (R. 109; 200). In his Suggestion of Error, the Attorney General called to the attention of the court below, the affiliation with the N. A. A. C. P. of one of petitioner's counsel (R. 299), and offered to withdraw that Suggestion of Error if one of petitioner's counsel would submit an affidavit "that he did not know that at some point in a trial in criminal court in Mississippi that an objection to such illegally obtained testimony must have been made" (R. 310-311). So intent was the Attorney General upon acquiring such an affidavit that he purposefully repeated the "offer" (R. 315); and called attention to counsel's having declined to supply it (R. 325-326). This state-

[5] Vol. 9, No. 8, **Southern School News**, February, 1963; **Reporter Magazine**, May 9, 1963; "A Lawyer Leaves Mississippi."

ment is misleading since it ignores the fact that at "some point" in the proceeding objection to the use of the illegally acquired evidence was made. Moreover, the success of the Suggestion of Error is pursuasive evidence of the insinuation into this case of political factors, prejudicial to petitioner and attributable to his civil rights activities.

Attempts of the state to curtail the privilege to engage in civil rights activities, to espouse dissident views and to participate in activities to secure those rights have been invalidated by this Court as violative of freedom of association and speech as encompassed in the Fourteenth Amendment. *NAACP* v. *Button*, 371 U. S. 415; *Bates* v. *Little Rock*, 361 U. S. 516; *NAACP* v. *Alabama*, 357 U. S. 449; *NAACP* v. *Louisiana*, 366 U. S. 293; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, *cf. Edwards* v. *South Carolina*, 372 U. S. 229. The use of criminal and judicial process by local and State officials to curtail those same privileges is equally as violative of petitioner's constitutional rights as is the abuse of criminal and judicial process as a subtle device to preserve racial segregation. Evasive schemes by the state, purposed and calculated to sustain and support racial segregation is proscribed by the Fourteenth Amendment's equal protection and due process clauses. See *Gomillion* v. *Lightfoot*, 364 U. S. 339; *Smith* v. *Allwright*, 321 U. S. 649, 664; *Cooper* v. *Aaron*, *supra*; *Ross* v. *Texas*, 341 U. S. 918; *Shepard* v. *Florida*, 341 U. S. 50; cf. *Barrows* v. *Jackson*, 346 U. S. 249, 254, 260. "Due Process", as set forth in the Fourteenth Amendment of the United States Constitution requires that a criminal conviction be supported by evidence of guilt, *Thompson* v. *Louisville*, 362 U. S. 199. The facts found below are not controlling on appeal. Evalution of basic constitutional issues requires this Court to independently evaluate the evidence set forth in the record and to determine the merit of the conviction upon that assessment. *Blackburn* v. *Alabama*, 361 U. S. 199; *Spano* v. *New York*, 360 U. S. 315; *Napue* v.

Illinois, 360 U. S. 264; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Feiner* v. *New York*, 340 U. S. 315, 316, 322; *Watts* v. *Indiana*, 338 U. S. 49, 50-51; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Norris* v. *Alabama*, 294 U. S. 587, 589, 590, cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, 285.

Examination of the record below establishes, beyond question, that on March 3, 1963, petitioner was in Clarksdale between 4:45 and 5:20 p.m. at the Delta funeral home and, at his own home between 5:30 and 7 p.m. (R. 147; 150-188; 204). The complaining witness was importuned between 5:30 and 5:56 p.m. in a car travelling between the intersection of Routes 61 and 49 outside of Clarksdale and the bus station in Shelby, Mississippi, a distance of twenty-two miles, at a rate of speed between 40 and 45 miles per hour (R. 47; 48; 166; 200). At maximum speeds, consistant with the law, that ride requires 30 minutes (R. 178). At best, to drive from the intersection to Shelby and to return to the Clarksdale city limits, requires one hour. The call to ascertain the owner of the license was made at 5:56 p.m. Some five to ten minutes before 5:56 p.m. a black car, similar to that in which Eilert was riding, was seen to turn north from Shelby toward Clarksdale (R. 37). A round trip, therefore, required a driver to be on the highway between 5:10 and 6:20 p.m. At 5:15 p.m., petitioner was talking to two persons in an office in Clarksdale and from 5:30 or 5:35 p.m., until his arrest at 7 p.m., he was in the presence of his wife, daughter and either of two guests at his home. Descriptions of the driver was both tall and short, wearing a sweater, not wearing a sweater or perhaps wearing a sweater under a coat (R. 68; 92).

Eilert's driver worked in a liquor store in Alligator, Mississippi, mid-way between Clarksdale and Shelby (R. 65). Although he did not know how long his trip from Memphis to Clarksdale took and was not wearing a watch, Eilert was certain that he arrived at the intersection at 5 p.m. and got a ride to Shelby at 5:30 p.m. (R. 43; 47). Based upon this testimony, within twenty-six minutes, Eilert was driven some twenty miles, through towns at a speed not

exceeding 40-45 miles per hour, experienced the alleged incident with the driver, made two telephone calls, walked to the Shelby police station, and gave an oral statement to the authorities.

The case before this court is one of identity. A general and inconsistent description of a Negro male in a black car was converted into a positive description of petitioner by a police officer whose efforts supplied a single person, petitioner, for identification by a slow and unschooled youth to whom all Negroes look alike (R. 49; 109; 200). The record is replete with enthusiastic efforts of the officials to attach responsibility for the act to petitioner. No efforts were made to investigate anyone other than petitioner.

Apart from the obvious inconsistancies in the testimony of the complaining witness, his recital of events differs significantly from that of Officer Reynolds. These factors, sufficient to warrant dismissal following the State's case, when weighed together with the evidence of petitioner's whereabouts between 4:45 and 7:00 p.m. on March 3, 1962, negate proof of the State's case beyond a reasonable doubt.

The inadequacy of the evidence upon which the conviction of petitioner rests, is a pursuasive example of the State's use of its legal process as a punitive measure, as another effort to discourage petitioner's civil rights and N. A. A. C. P. activities and to intimidate similar efforts by other Negroes in Mississippi. The successful conviction of petitioner will be an invaluable weapon of disparagement of the N. A. A. C. P. and its members.

The rules of evidence do not permit a record to include those matters which may bear a direct relationship to and indeed, be a composite part of the matter before the court unless there is conformity to technical rules. That process cannot be impugned in the preponderance of legal proceedings. Since *Brown* v. *Board of Education, supra,* with its implicit threat to racial segregation the variety of methods employed to sustain racial segregation and to supress deviant expressions and activities, has made clear the neces-

sity for specific attention to the purpose and effect of apparently guileless but suspect activities. Faced with this reality, it is incumbent upon the courts to scrutinize these cases closely and evaluate them in the light of matters of common knowledge, in order to detect proscribed unconstitutional actions.

There is in existence a very real struggle between seekers of equal rights and those dedicated to sustentation of privilege. Actions, under the pseudonym of legal process or preservation of law and order, which serve to intimidate civil rights advocates and are punitive in purpose and effect are as clearly proscribed by the Fourteenth Amendment as are direct measures.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that the exceptional nature of circumstances herein described and the importance of the issues implicit therein warrant granting of this petition for writ of certiorari.

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APPENDIX A

Opinion of the Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,652

AARON HENRY

vs.

STATE OF MISSISSIPPI

RODGERS, *Justice*:

The appellant was tried and convicted in the Justice of the Peace Court of Bolivar County, Mississippi, on a charge of disorderly conduct of disturbing the peace of Sterling Lee Eilert. The charge was brought under § 2089.5, Miss. Code 1942, Rec. On appeal to the County Court, the case was tried de novo, and appellant was again convicted. He was accordingly sentenced to serve sixty days in jail and pay a fine of $250. The Circuit Court affirmed the judgment of the County Court and appellant has appealed to this Court.

The evidence in this case reveals the following facts: On March 3, 1962, Sterling Lee Eilert "hitchhiked" (begged an automobile ride) on the various highways from his home in Memphis, Tennessee, to the intersection of Highways 49 and 61 in Clarksdale, Mississippi. He arrived at this intersection about five o'clock in the afternoon, and about 5:30 o'clock appellant stopped his automobile at this intersection and invited young Mr. Eilert to ride with him. They proceeded along Highway 61 toward Shelby, Mississippi, and after they had passed Alligator, Mississippi, appellant

asked Mr. Eilert about his sex life. It is not necessary to detail the ensuing conversation. It is sufficient to say that the foregoing conversation culminated in assault upon Mr. Eilert, in that appellant reached over and touched his privates. The State witness immediately requested the appellant to stop the automobile, and when it stopped, he got out and went to the back and got his suitcase. He looked at the tag on the car, and although he could not see all of the numbers on the tag, he remembered the number 1798. Mr. Eilert immediately sought the police, first by telephoning and finally by going to the police station. He gave the police a description of the automobile and the driver, as well as the numbers he saw on the tag. The officers promptly radioed Clarksdale for the name of the owner of the automobile from the records of license tags. This request was shown to have been made at 5:56 o'clock. The information was immediately given to the officers, that Aaron Henry was the owner of the automobile described by the witness.

The officers prepared an affidavit, which was signed by the witness Eilert. The affidavit was presented to the Justice of the Peace, Rowe, who issued a warrant for the arrest of defendant Aaron Henry. One of the officers took the warrant and the witness Eilert to Clarksdale and the warrant was turned over to the desk clerk at police headquarters. Notice was given to patrol cars by radio from the Clarksdale police station, notifying them to be on the lookout for appellant, Aaron Henry. This information was received by radio by officer Henry Petty at 6:04 P. M., and he immediately went to the drug store and home of Aaron Henry, but his automobile was not at the drug store or at his home. Later in the afternoon, appellant's automobile was located at his home ten or twelve minutes to seven o'clock. Notice was relayed by radio to the chief of police, who went to the home of defendant and arrested him a few minutes before seven o'clock.

Appellant's defense to the charge was an alibi. His testimony shows that he left the drug store at 4:45 o'clock, and went to the Delta Burial Corporation. This is a funeral home operated by John Melcher. He said he remained at the funeral home until approximately 5:20 P. M.

Defendant introduced several witnesses who testified that they saw him at the funeral home between the hours of 4:45 and 5:20. Defendant also introduced his wife and two other witnesses who testified he arrived at his home about 5:30 or 5:35 o'clock. Defendant also introduced a large number of Negro professional men, doctors, dentists, ministers and professors, as well as colored plantation owners and business men, to prove his good character.

Appellant has presented four assignments of error, on appeal, alleged to have been made in the trial of this case in the court below, but only argues three propositions, namely: (1) The assumption of jurisdiction of the cause by the trial court deprived appellant of his constitutional rights to due process. (2) The court erred in not granting a new trial to appellant on the ground that the county court permitted the State to introduce evidence obtained by an unlawful search of his automobile. (3) Appellant's conviction denied due process of law to the defendant because it rested on insufficient evidence of the essential elements of the crime, and because of error in the court's rulings.

I.

The appellant based his first assignment of error upon "the absence of competent evidence of the existence of an affidavit on March 3, 1962, the date of the commencement of prosecution of appellant . . .". Appellant then argues that the justice of the peace had no jurisdiction to issue a warrant for the arrest of the defendant, Aaron Henry, and thereafter, the county court and circuit court had no jurisdiction of the cause because the defendant was alleged to have been convicted without due process of law.

The theme of appellant's contention is that no affidavit was made before a justice of the peace charging defendant with the crime; that in fact no warrant was issued by the justice of the peace before defendant was arrested. To sustain this thesis, appellant introduced one of his attorneys who testified (over objection of the State) that he called upon the county attorney and asked him if he had the affidavit "pursuant to" the arrest of Aaron Henry. He stated that the county attorney told him he did not have the affidavit, but that it was in the custody of Mr. Rowe, the Justice of the Peace, at Shelby. He said the county attorney advised him it would be necessary to amend the affidavit. This attorney also testified that he called the justice of the peace on the telephone and said that he was informed that he had no knowledge of the arrest of Aaron Henry, and that it did not come before him on the date of the alleged affidavit. Appellant also testified in his own behalf, stating that the warrant served on him was not the warrant in the file certified to the county court by the justice of the peace.

The testimony for the State showed the prosecuting witness Sterling Eilert signed an affidavit and that thereafter the Justice of the Peace Rowe issued the warrant charging defendant with a misdemeanor. The warrant was delivered to Officer Charles Reynolds, who, in turn, delivered it to the desk sergeant at Clarksdale, Mississippi. Chief of Police Ben C. Collins secured the warrant and served it upon the defendant at his home.

The record further reveals that the defendant's attorney admitted that an amended affidavit was properly substituted for the original which was lodged with the justice of the peace on the 14th day of March (the day defendant was tried in the justice of the peace court.) Defendant was arraigned and tried on the amended affidavit certified to the county court from a justice of the peace court. A copy of this amended affidavit was given to defendant's

attorney, and no objection was made to the amended affidavit at the time of the trial in the justice of the peace court.

The appellant points out that § 1832, Miss. Code 1942, Rec., requires that an affidavit be lodged with the justice of the peace charging commission of a crime before warrant shall issue for arrest of an offender.

This Court has repeatedly held that an affidavit is a prerequisite to prosecution for a misdemeanor. Moreover, we have held that a justice of the peace court has no jurisdiction of a criminal charge until an affidavit has been lodged with it. See the cases cited under the above Code § 1832. This is also the general rule accepted in a majority of jurisdictions. See: 22 C. J. S., Criminal Law, § 143, p. 379; 14 Am. Jur., Criminal Law, § 245, p. 937.

Amendments, however, are liberally allowed under our Mississippi procedure so as to bring the merits of a case fairly to trial. The following Code sections are illustrative of this point. The applicable part of § 1202, Miss. Code 1942, Rec., with reference to this subject is in the following language: "On the trial in the circuit court of any case on such appeal the affidavit charging the offense and other proceedings may be amended at any time before a verdict, so as to bring the merits of the case fairly to trial on the charge intended to be embraced in the affidavit."

Section 2535, Miss. Code 1942, Rec., is in the following language: "When an appeal is presented to the circuit court in any criminal case from the judgment or sentence of the justice of the peace or municipal court, it shall be permissible, on application of the state or party prosecuting, to amend the affidavit, pleading, or proceedings so as to bring the merits of the case fairly to trial on the charge intended to be set out in the original affidavit; the amendment to be made on such terms as the court may consider proper."

The foregoing Code sections are also applicable to appeals to the county court. See § 1617, Miss. Code 1942, Rec.

We have often held that defective affidavits on which a defendant was convicted in a justice of the peace court could be amended in the circuit court on appeal. Coulter v. State, 75 Miss. 356, 22 So. 872; Triplett v. State, 80 Miss. 379, 31 So. 743; Brown v. State, 81 Miss. 137, 32 So. 952; Mays v. State, 216 Miss. 631, 63 So. 2d 110; Simmons v. State, 179 Miss. 713, 176 So. 726; Moran v. State, 137 Miss. 435, 102 So. 388; Weddell v. Seal, Admr., 45 Miss. 726; Green v. Boone, 57 Miss. 617. See also 31 Am. Jur., Justices of the Peace, § 130, p. 287. This is also accepted as the general rule. See 31 Am. Jur., Justices of the Peace, § 126, p. 285.

Section 1205, Miss. Code 1942, Rec., provides the method of transmitting cases from the justice of the peace court to the circuit court or county court, and § 1199, Miss. Code 1942, Rec. provides the form of the certificate required to be used to verify the record of the justice of the peace court on appeal.

It is universally accepted as the general rule of law that where properly authenticated or certificated records have been filed on appeal, they import absolute verity, and the record is the sole, conclusive and unimpeachable evidence of the proceedings in the court below. If the record is incomplete or incorrect, amendment, or correction, must be sought by appropriate proceeding. The record cannot be impeached collaterally by oral testimony or extrinsic evidence aliunde the record. 4A C. J. S., Appeal and Error, § 1143, p. 1201, *et seq.* See also 31 Am. Jur., Justices of the Peace, § 126, p. 285.

In the case of Whittington v. State, 218 Miss. 631, 67 So. 2d 515, this Court pointed out the change in the law as shown by § 1987, Miss. Code 1942, Rec., and said: "Although under Sections 1199 and 1200, Code 1942, it is still mandatory that the justice of the peace or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond,

yet, if no objection is made to the transcript before or during the trial of the case, on its merits, it will still be conclusively presumed that the transcript was before the court and complied in every respect with the law. Hence no error can be predicated on that ground on appeal to this Court."

The certificate of the justice of the peace and the record in this case show a general affidavit was made on "3-3-62" charging defendant with "disturbing the peace" and that a capias was issued on "3-3-62."

In the case of Winfield v. City of Jackson, 89 Miss. 272, 42 So. 183, this Court held that where an affidavit was missing, affidavit could be supplied by oral proof on the trial.

In the case of Redus v. Campbell, 85 Miss. 165, 37 So. at 1010, we held that it was competent for the circuit court to issue the necessary process to require the justice of the peace to produce the original papers in the cause of action.

The most direct and obvious method of procedure, applicable in a case where it is sought to be shown that there was in fact no affidavit made or lodged with the justice of the peace at the time the warrant was issued, is to summon the justice of peace to bring his trial docket into court. He may then be required to testify on a preliminary motion to quash and dismiss a criminal charge against the defendant, whether or not there was in fact an affidavit filed or lodged with him.

We are therefore of the opinion that the trial court was correct in overruling the motion of appellant to quash the amended affidavit charging the defendant with a misdemeanor, although the original affidavit could not be found among the papers certified to the county court; because the record reveals there was an original affidavit lodged with the justice of peace at the time the warrant was issued.

II.

It is next contended by appellant that the court was in error in overruling his motion for a directed verdict,

made when the State had rested its case. The second part of this motion is based upon the proposition that the State introduced the testimony of Officer Ben C. Collins, with regard to evidence alleged to have been obtained by an unlawful search of appellant's automobile.

The record shows that Officer Collins testified that after he had arrested Aaron Henry at his home and had conveyed him to the police station, he returned to Henry's home for the purpose of examining the interior of his automobile.

He testified that he went to the door and knocked and finally Aaron Henry's wife came to the door, and he told her that he would like to look at her car and she said she would get the keys because the car was locked. The officer unlocked the car and turned the switch on, plugged the cigarette lighter in, and discovered that it would not work. He then looked in the ash tray on the right side, and found it to be filled with red Dentyne Chewing Gum wrappers. The officer then said that he asked Aaron Henry's wife and people present "Can you tell me what's in this ash tray?" He then stated: "Aaron Henry's little girl said, yes, sir, them is Dentyne Chewing Gum wrappers, I put them in there about three days ago."

This evidence corroborates the testimony of the prosecuting witness, Sterling Lee Eilert, above set ont, wherein he had informed the officers of the color of the upholstery of the automobile, the fact that the lighter would not work, and the ash tray was filled with chewing gum wrappers. There had been very little evidence to corroborate the testimony of Eilert until Officer Collins testified. Charles Reynolds knew the color of the upholstery of defendant's automobile, and knew that the automobile was a "Star Chief Pontiac."

No objection was made to the testimony of Officer Collins with reference to the search at the time it was introduced and defense counsel cross-examined him about the chewing gum wrappers and the ash tray.

After careful examination of this record as a whole, we have come to the conclusion that the search of Aaron Henry's locked automobile without a search warrant, at a time when the automobile was in defendant's driveway, was an unlawful search and was in violation of § 23, Miss. Constitution 1890.

In 1922, the Mississippi Supreme Court adopted the exclusionary rule announced in Weeks v. United States, 232 U. S. 383, in Tucker v. State, 128 Miss. 211, 90 So. 845. Since that time this Court has accumulated a great wealth of opinions which have meticulously followed the exclusionary rule rejecting testimony obtained by unlawful search and seizure.[1]

In the case of Boyd v. State, 206 Miss. 573, 40 So. 2d 303 (1949), this Court pointed out that the search of an automobile without a warrant was unauthorized, and that

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[1] At one time the rule was firmly settled, that evidence obtained by an unreasonable, unwarranted and unlawful search and seizure, if otherwise pertinent to the issue was not rendered incompetent and inadmissible because of the wrongful method in which it was obtained. See 20 Am. Jur., Evidence, § 394, p. 354. This rule passed through various stages, as shown by the following cases: Boyd v. United States, 116 U. S. 616 (1886); Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, LRA 1915B 834, Ann. Cas. 1915C 1177 (1914); Wolf v. Colorado, 338 United States 25 (1949); McNabb, et al. v. United States, 318 U. S. 332 (1943); Irvine v. California, 347 U. S. 128 (1954); Elkins v. United States, 364 U. S. 206 (1960); Agnello, et al. v. United States, 269 U. S. 20 (1925); Rochin v. California, 342 U. S. 165 (1952).

Finally, in the case of Mapp v. Ohio, 367 U. S. 643, 81A S. Ct. Rep. 1684, the Supreme Court of the United States held that the evidence obtained by unconstitutional search was inadmissible in state prosecutions, and vitiated state convictions by bringing the exclusionary rule established by the Fourth Amendment under the "due process" clause of the Fourteenth Amendment. The Court said: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

an officer would not be permitted to invade the private premises of a defendant without a search warrant, and search an automobile in his garage, after the automobile had come to rest at the completion of the journey. See also Brooks v. State, 209 Miss. 150, 46 So. 2d 94. Cf. Smith v. State, 240 Miss. 738, 128 So. 2d 857.

III.

It is suggested by the Attorney General in the instant case that the wife of defendant consented to the search of the automobile and thereby waived the necessity of a search warrant. We prefer, however, to follow the great weight of authority which holds that a wife cannot waive the constitutional rights of her husband. We hold that appellant's wife did not waive his constitutional rights by consenting to the search of his automobile. Cofer v. United States, 37 Fed. 2d 677 (Miss. 1930); Gilliland v. Commonwealth, 224 Ky. 453, 6 S. W. 2d 467; Hays v. State, 261 P. 232 (Okla.); Rose v. State, 254 P. 509 (Okla.); 47 Am. Jur., Search and Seizures, § 72, p. 548. Cf. Brewer v. State, 142 Miss. 100, 107 So. 376.

IV.

As a general rule in jurisdictions which adhere to the rule denying the admissibility of evidence secured by an unlawful search and seizure, the accused must ordinarily interpose a timely challenge to the validity of the seizure and admission of evidence. 20 Am. Jur., Evidence, § 396, p. 357; 23A C. J. S., Criminal Law, § 1060, p. 7. In some jurisdictions, a preliminary motion is made for the suppression of evidence. In Mississippi, however, it is only necessary to object to admission of the evidence at the time it is offered. See 23A C. J. S., Criminal Law, § 1060, at p. 14; Holmes v. State, 145 Miss. 351, 111 So. 860.

It has been a long established procedural rule in this State that parties prejudiced by the introduction of inadmis-

sible evidence are required to object to its admissibility at the time it is offered so that the trial judge may determine its admissibility before it is submitted to the jury. Moreover, error cannot be predicated upon admission of evidence to which no objection was made. McNutt v. State, 143 Miss. 347, 108 So. 721; Harris v. State, 153 Miss. 1, 120 So. 206; Williams v. State, 171 Miss. 324, 157 So. 717; Dick, Aleck, and Henry, Slaves v. State, 30 Miss. 593; Loftin v. State, 150 Miss. 228, 116 So. 435; Holmes v. State, 146 Miss. 351, 111 So. 860; Carr v. State, 187 Miss. 535, 192 So. 569; Wright v. State, 212 Miss. 491, 54 So. 2d 735.

We have also held that a motion to exclude inadmissible testimony at the conclusion of the evidence comes too late. Harris v. State, supra; Dick v. State, supra; Peters v. State, 106 Miss. 333, 63 So. 666.

In the instant case, the motion made by the defense attorney at the close of the State's testimony did not request the court to exclude the testimony alleged to have been wrongfully obtained. The motion requested a directed verdict, or that the case be dismissed against defendant because some of the testimony introduced was obtained illegally. In short, under ordinary circumstances error could not be predicated upon the admission of such testimony.

It appears from the records reaching this Court that numerous cases have been tried recently in this State by nonresident attorneys who have traveled great distances to appear in defense of persons charged with misdemeanors and minor offenses, but who are not adept in the technique of jury trials in criminal court in Mississippi. This Court is conscious of the fact that such a situation has cast an unusual burden upon the trial judges to determine how to eliminate objectionable testimony, when no objection is made, and at the same time insure a fair trial by due process of law, as required by Article 3, § 14, Miss. Constitution, 1890.

In the case of Brooks v. State, 209 Miss. 150, 46 So. 2d 94, this Court pointed out that in a narrow class of cases where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had, and the Court said: "Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal."

In the case of Brown v. State of Mississippi, 297 U. S. 278 (173 Miss. 542, 158 So. 339), where a confession had been obtained by duress, and the Mississippi Supreme Court sustained the conviction on the grounds that (1) immunity from self-incrimination is not essential to due process of law, and (2) failure of the trial court to exclude confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude confessions, the ruling would have been mere error, reversible on appeal, but not a violation of a constitutional right. The United States Supreme Court said: "In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner." The case was therefore reversed.

In the instant case, we are of the opinion that a new trial should be granted because appellant's case is based primarily upon his identity. Testimony of the State's witness, Sterling Lee Eilert, is, in effect, uncorroborated without the evidence disclosed by the inspection of defendant's automobile. The unlawfully obtained evidence leaves no

room to doubt that the witness Eilert had been in defendant's automobile. The admission of the evidence obtained by the search of defendant's automobile thus prevented him from obtaining a fair trial, as guaranteed to all persons in courts of Mississippi. Section 14, Miss. Constitution, 1890. We therefore hold that this case comes within the narrow rule set out in Brooks v. State, supra.

V.

We do not believe that there is any merit in the contention of appellant that the evidence is insufficient to support a verdict of guilty. The defense offered by the appellant was an alibi, and we are of the opinion that such evidence was a question for the determination of the jury. Prisock v. State, —— Miss. ——, 141 So. 2d 711; Cobb v. State, 235 Miss. 57, 108 So. 2d 719; Passons v. State, 239 Miss. 629, 124 So. 2d 847.

The judgment of the lower court is reversed and the case is remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

LEE, P. J., AND KYLE, ARRINGTON AND ETHRIDGE, JJ., concur.

Judgment of the Supreme Court of Mississippi

Monday, June 3, 1963, Court Sitting:

No. 42,652

AARON HENRY

vs.

STATE OF MISSISSIPPI

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Bolivar County, Second District, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 20th day of November 1962—a conviction of disorderly conduct under Section 2089.5 of the Mississippi Code of 1942 Recompiled and a sentence to pay a fine of $250.00 and costs and to serve 60 days in jail—be and the same is hereby reversed and remanded. It is further ordered and adjudged that the Costs of the Clerk of this Court be paid out of the appropriation provided for cases in which the State Fails.

APPENDIX B

Opinion of the Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,652

AARON HENRY

vs.

STATE OF MISSISSIPPI

RODGERS, *Justice*:

On Suggestion of Error, the original opinion in this case has been withdrawn by this Court and the following opinion is substituted in its place.

The appellant was tried and convicted in the Justice of the Peace Court of Bolivar County, Mississippi, on a charge of disorderly conduct of disturbing the peace of Sterling Lee Eilert. The charge was brought under Section 2089.5, Miss. Code 1942, Rec. On appeal to the County Court, the case was tried de novo, and appellant was again convicted. He was accordingly sentenced to serve sixty days in jail and pay a fine of $250. The Circuit Court affirmed the judgment of the County Court and appellant has appealed to this Court.

The evidence in this case reveals the following facts: On March 3, 1962, Sterling Lee Eilert "hitchhiked" (begged an automobile ride) on the various highways from his home in Memphis, Tennessee, to the intersection of Highways 49 and 61 in Clarksdale, Mississippi. He arrived at this inter-

section about five o'clock in the afternoon, and about 5:30 o'clock appellant stopped his automobile at this intersection and invited young Mr. Eilert to ride with him. They proceeded along Highway 61 toward Shelby, Mississippi, and after they had passed Alligator, Mississippi, appellant asked Mr. Eilert about his sex life. It is not necessary to detail the ensuing conversation. It is sufficient to say that the foregoing conversation culminated in assault upon Mr. Eilert, in that appellant reached over and touched his privates. The State witness immediately requested the appellant to stop the automobile, and when it stopped, he got out and went to the back and got his suitcase. He looked at the tag on the car, and although he could not see all of the numbers on the tag, he remembered the number 1798. Mr. Eilert immediately sought the police, first by telephoning and finally by going to the police station. He gave the police a description of the automobile and the driver, as well as the numbers he saw on the tag. The officers promptly radioed Clarksdale for the name of the owner of the automobile from the records of license tags. This request was shown to have been made at 5:56 o'clock. The information was immediately given to the officers, that Aaron Henry was the owner of the automobile described by the witness.

The officers prepared an affidavit, which was signed by the witness Eilert. The affidavit was presented to the Justice of the Peace, Rowe, who issued a warrant for the arrest of defendant Aaron Henry. One of the officers took the warrant and the witness Eilert to Clarksdale and the warrant was turned over to the desk clerk at police headquarters. Notice was given to patrol cars by radio from the Clarksdale police station, notifying them to be on the lookout for appellant, Aaron Henry. This information was received by radio by officer Henry Petty at 6:04 P. M., and he immediately went to the drug store and home of Aaron Henry, but his automobile was not at the drug store or at

his home. Later in the afternoon, appellant's automobile was located at his home ten or twelve minutes to seven o'clock. Notice was relayed by radio to the chief of police, who went to the home of the defendant and arrested him a few minutes before seven o'clock.

Appellant's defense to the charge was an alibi. His testimony shows that he left the drug store at 4:45 o'clock, and went to the Delta Burial Corporation. This is a funeral home operated by John Melcher. He said he remained at the funeral home until approximately 5:20 P. M.

Defendant introduced several witnesses who testified that they saw him at the funeral home between the hours of 4:45 and 5:20. Defendant also introduced his wife and two other witnesses who testified he arrived at his home about 5:30 or 5:35 o'clock. Defendant also introduced a large number of Negro professional men, doctors, dentists, ministers and professors, as well as colored plantation owners and business men, to prove his good character.

Appellant has presented four assignments of error, on appeal, alleged to have been made in the trial of this case in the court below, but only argues three propositions, namely: (1) The assumption of jurisdiction of the cause by the trial court deprived appellant of his constitutional rights in due process. (2) The court erred in not granting a new trial to appellant on the ground that the county court permitted the State to introduce evidence obtained by an unlawful search of his automobile. (3) Appellant's conviction denied due process of law to the defendant because it rested on insufficient evidence to the essential elements of the crime, and because of error in the court's rulings.

I.

The appellant based his first assignment of error upon "the absence of competent evidence of the existence of an affidavit on March 3, 1962, the date of the commencement

of prosecution of appellant . . . . ." Appellant then argues that the justice of the peace had no jurisdiction to issue a warrant for the arrest of the defendant, Aaron Henry, and thereafter, the county court and circuit court had no jurisdiction of the cause because the defendant was alleged to have been convicted without due process of law.

The theme of appellant's contention is that no affidavit was made before a justice of the peace charging defendant with the crime; that in fact no warrant was issued by the justice of the peace before defendant was arrested. To sustain this thesis, appellant introduced one of his attorneys who testified (over objection of the State) that he called upon the county attorney and asked him if he had the affidavit "pursuant to" the arrest of Aaron Henry. He stated that the county attorney told him he did not have the affidavit, but that it was in the custody of Mr. Rowe, the Justice of the Peace, at Shelby. He said the county attorney advised him it would be necessary to amend the affidavit. This attorney also testified that he called the justice of the peace on the telephone and said that he was informed that he had no knowledge of the arrest of Aaron Henry, and that it did not come before him on the date of the alleged affidavit. Appellant also testified in his own behalf, stating that the warrant served on him was not the warrant in the file certified to the county court by the justice of the peace.

The testimony for the State showed the prosecuting witness Sterling Eilert signed an affidavit and that thereafter the Justice of the Peace Rowe issued the warrant charging defendant with a misdemeanor. The warrant was delivered to Officer Charles Reynolds, who, in turn, delivered it to the desk sergeant at Clarksdale, Mississippi. Chief of Police Ben C. Collins secured the warrant and served it upon the defendant at his home.

The record further reveals that the defendant's attorney admitted that an amended affidavit was properly substituted

for the original which was lodged with the justice of the peace on the 14th day of March (the day the defendant was tried in the justice of the peace court). Defendant was arraigned and tried on the amended affidavit certified to the county court from a justice of the peace court. A copy of this amended affidavit was given to defendant's attorney, and no objection was made to the amended affidavit at the time of the trial in the justice of the peace court.

The appellant points out that Section 1832, Miss. Code 1942, Rec., requires that an affidavit be lodged with the justice of the peace charging commission of a crime before warrant shall issue for arrest of an offender.

This Court has repeatedly held that an affidavit is a prerequisite to prosecution for a misdemeanor. Moreover, we have held that a justice of the peace court has no jurisdiction of a criminal charge until an affidavit has been lodged with it. See the cases cited under the above Code Section 1832. This is also the general rule accepted in a majority of jurisdictions. See: 22 C. J. S., Criminal Law, Sec. 143, p. 379; 14 Am. Jur., Criminal Law, Section 245, p. 937.

Amendments, however, are liberally allowed under our Mississippi procedure so as to bring the merits of a case fairly to trial. The following code sections are illustrative of this point. The applicable part of Section 1202, Miss. Code 1942, Rec., with reference to this subject is in the following language: "On the trial in the circuit court of any case on such appeal the affidavit charging the offense and other proceedings may be amended at any time before a verdict, so as to bring the merits of the case fairly to trial on the charge intended to be embraced in the affidavits."

Section 2535, Miss. Code 1942, Rec., is in the following language: "When an appeal is presented to the circuit

court in any criminal case from the judgment or sentence of the justice of the peace or municipal court, it shall be permissible, on application of the state or party prosecuting, to amend the affidavit, pleading, or proceedings so as to bring the merits of the case fairly to trial on the charge intended to be set out in the original affidavit; the amendment to be made on such terms as the court may consider proper."

The foregoing Code sections are also applicable to appeals to the county court. See Section 1617, Miss. Code 1942, Rec.

We have often held that defective affidavits on which a defendant was convicted in a justice of the peace court could be amended in the circuit court on appeal. Coulter v. State, 75 Miss. 356, 22 So. 872; Triplett v. State, 80 Miss. 379, 31 So. 743; Brown v. State, 81 Miss. 137, 32 So. 952; Mays v. State, 216 Miss. 631, 63 So. 2d 110; Simmons v. State, 179 Miss. 713, 176 So. 726; Moran v. State, 137 Miss. 435, 102 So. 388; Weddell v. Seal, Admr., 45 Miss. 726; Green v. Boone, 57 Miss. 617. See also 31 Am. Jur., Justices of the Peace, Sec. 130, p. 287. This is also accepted as the general rule. See 31 Am. Jur., Justices of the Peace, Sec. 126, p. 285.

Section 1205, Miss. Code 1942, Rec., provides the method of transmitting cases from the justice of the peace court to the circuit court or county court, and Section 1199, Miss. Code 1942, Rec. provides the form of the certificate required to be used to verify the record of the justice of the peace court on appeal.

It is universally accepted as the general rule of law that where properly authenticated or certificated records have been filed on appeal, they import absolute verity, and the record is the sole, conclusive and unimpeachable evidence of the proceedings in the court below. If the record is incomplete or incorrect, amendment, or correction, must

be sought by appropriate proceedings. The record cannot be impeached collaterally by oral testimony or extrinsic evidence aliunde the record. 4A C. J. S., Appeal and Error, Sec. 1143, p. 1201, *et seq.* See also 31 Am. Jur., Justices of the Peace, Sec. 126, p. 285.

In the case of Whittington v. State, 218 Miss. 631, 67 So. 2d 515, this Court pointed out the change in the law as shown by Section 1987, Miss. Code 1942, Rec., and said: "Although under Sections 1199 and 1200, Code 1942, it is still mandatory that the justice of the peace or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case, on its merits, it will still be conclusively presumed that the transcript was before the court and complied in every respect with the law. Hence no error can be predicated on that ground on appeal to this Court."

The certificate of the justice of the peace and the record in this case show a general affidavit was made on "3-3-62" charging defendant with "disturbing the peace" and that a capias was issued on "3-3-62."

In the case of Winfield v. City of Jackson, 89 Miss. 272, 42 So. 183, this Court held that where an affidavit was missing, affidavit could be supplied by oral proof on the trial.

In the case of Redus v. Campbell, 85 Miss. 165, 37 So. at 1010, we held that it was competent for the circuit court to issue the necessary process to require the justice of the peace to produce the original papers in the cause of action.

The most direct and abvious method of procedure, applicable in a case where it is sought to be shown that there was in fact no affidavit made or lodged with the justice of the peace at the time the warrant was issued, is

to summon the justice of peace to bring his trial docket into court. He may then be required to testify on a preliminary motion to quash and dismiss a criminal charge against the defendant, whether or not there was in fact an affidavit filed or lodged with him.

We are therefore of the opinion that the trial court was correct in overruling the motion of appellant to quash the amended affidavit charging the defendant with a misdemeanor, although the original affidavit could not be found among the papers certified to the county court; because the record reveals there was an original affidavit lodged with the justice of peace at the time the warrant was issued.

II.

It is next contended by appellant that the court was in error in overruling his motion for a directed verdict, made when the State had rested its case. The second part of this motion is based upon the proposition that the State introduced the testimony of Officer Ben C. Collins, with regard to evidence alleged to have been obtained by an unlawful search of appellant's automobile.

The record shows that Officer Collins testified that after he had arrested Aaron Henry at his home and had conveyed him to the police station, he returned to Henry's home for the purpose of examining the interior of his automobile.

He testified that he went to the door and knocked and finally Aaron Henry's wife came to the door, and he told her that he would like to look at her car and she said she would get the keys because the car was locked. The officer unlocked the car and turned the switch on, plugged the cigarette lighter in, and discovered that it would not work. He then looked in the ash tray on the right side, and found it to be filled with red Dentyne Chewing Gum wrappers. The officer then said that he asked Aaron Henry's wife

and people present "Can you tell me what's in this ash tray?" He then stated: "Aaron Henry's little girl said, yes, sir, them is Dentyne Chewing Gum wrappers, I put them in there about three days ago."

This evidence corroborates the testimony of the prosecuting witness, Sterling Lee Eilert, above set out, wherein he had informed the officers of the color of the upholstery of the automobile, the fact that the lighter would not work, and the ash tray was filled with chewing gum wrappers. There had been very little evidence to corroborate the testimony of Eilert until Officer Collins testified. Charles Reynolds knew the color of the upholstery of defendant's automobile, and knew that the automobile was a "Star Chief Pontiac."

No objection was made to the testimony of Officer Collins with reference to the search at the time it was introduced and defense counsel cross-examined him about the chewing gum wrappers and the ash tray.

After careful examination of this record as a whole, we have come to the conclusion that the search of Aaron Henry's locked automobile without a search warrant, at a time when the automobile was in defendant's driveway, was an unlawful search and was in violation of Section 23, Miss. Constitution 1890.

In 1922, the Mississippi Supreme Court adopted the exclusionary rule announced in Weeks v. United States, 232 U. S. 383, in Tucker v. State, 128 Miss. 211, 90 So. 845. Since that time this Court has accumulated a great wealth of opinions which have meticulously followed the exclusionary rule rejecting testimony obtained by unlawful search and seizures.[1]

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[1] At one time the rule was firmly settled that evidence obtained by an unreasonable, unwarranted and unlawful search and seizure, if otherwise pertinent to the issue was not rendered incompetent

(Continued on page 24a)

In the case of Boyd v. State, 206 Miss. 573, 40 So. 2d 303 (1949), this Court pointed out that the search of an automobile without a warrant was unauthorized, and that an officer would not be permitted to invade the private premises of a defendant without a search warrant, and search an automobile in his garage, after the automobile had come to rest at the completion of the journey. See also Brooks v. State, 209 Miss. 150, 46 So. 2d 94. Cf. Smith v. State, 240 Miss. 738, 128 So. 2d 857.

III

It is suggested by the Attorney General in the instant case that the wife of defendant consented to the search of the automobile and thereby waived the necessity of a search warrant. We prefer, however, to follow the great

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(Continued from page 23a)

and inadmissible because of the wrongful method in which it was obtained. See 20 Am. Jur., Evidence, § 394, p. 354. This rule passed through various stages, as shown by the following cases: Boyd v. United States, 116 U. S. 616 (1886); Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, LRA 1915B 834, Ann. Cas. 1915C 1177 (1914); Wolf v. Colorado, 338 United States 25 (1949); McNabb, et al. v. United States, 318 U. S. 332 (1943); Irvine v. California, 347 U. S. 128 (1954); Elkins v. United States, 364 U. S. 206 (1960); Agnello, et al. v. United States, 269 U. S. 20 (1925); Rochin v. California, 342 U. S. 165 (1952).

Finally, in the case of Mapp v. Ohio, 367 U. S. 643, 81A S. Ct. Rep. 1684, the Supreme Court of the United States held that the evidence obtained by unconstitutional search was inadmissible in state prosecutions, and vitiated state convictions by bringing the exclusionary rule established by the Fourth Amendment under the "due process" clause of the Fourteenth Amendment. The Court said: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

weight of authority which holds that a wife cannot waive the constitutional rights of her husband. We hold that appellant's wife did not waive his constitutional rights by consenting to the search of his automobile. Cofer v. United States, 37 Fed. 2d 677 (Miss. 1930); Gilliland v. Commonwealth, 224 Ky. 453, 6 S. W. 2d 467; Hays v. State, 261 P. 232 (Okla.); Rose v. State, 254 P. 509 (Okla.); 47 Am. Jur., Search and Seizures, Sec. 72, p. 548. Cf. Brewer v. State, 142 Miss. 100, 107 So. 376.

IV.

As a general rule in jurisdictions which adhere to the rule denying the admissibility of evidence secured by an unlawful search and seizure, the accused must ordinarily interpose a timely challenge to the validity of the seizure and admission of evidence. 20 Am. Jur., Evidence, Sec. 396, p. 357; 23A C. J. S., Criminal Law, Sec. 1060, p. 7. In some jurisdictions, a preliminary motion is made for the suppression of evidence. In Mississippi, however, it is only necessary to object to admission of the evidence at the time it is offered. See 23A C. J. S., Criminal Law, Sec. 1060, at p. 14; Holmes v. State, 146 Miss. 351, 111 So. 860.

It has been a long established procedural rule in this State that parties prejudiced by the introduction of inadmissible evidence are required to object to its admissibility at the time it is offered so that the trial judge may determine its admissibility before it is submitted to the jury. Moreover, error cannot be predicated upon admission of evidence to which no objection was made. McNutt v. State, 143 Miss. 347, 108 So. 721; Harris v. State, 153 Miss. 1, 120 So. 206; Williams v. State, 171 Miss. 324, 157 So. 717; Dick, Aleck and Henry, Slaves v. State, 30 Miss. 593; Loftlin v. State, 150 Miss. 228, 116 So. 435; Holmes v. State, 146 Miss. 351, 111 So. 860; Carr v. State, 187 Miss. 535, 192 So. 569; Wright v. State, 212 Miss. 491, 54 So. 2d 735.

We have also held that a motion to exclude inadmissible testimony at the conclusion of the evidence comes too late. Harris v. State, supra; Dick v. State, supra; Peters v. State, 106 Miss. 333, 63 So. 666.

We have therefore reached the conclusion that since the defendant made no objection to the introduction of the illegally obtained evidence, at the time it was offered, he waived his right to object to such evidence and error cannot now be predicated upon the failure of the trial judge to exclude such evidence from the consideration of the jury. Johnson v. State, 220 Miss. 452, 70 So. 2d 926; Baggett v. State, 219 Miss. 583, 69 So. 2d 389; Gillespie v. State, 215 Miss. 380, 61 So. 2d 150; Bennett v. State, — Miss. —, 52 So. 2d 837; White v. State, 202 Miss. 246, 30 So. 2d 894; Poole v. State, 231 Miss. 1, 94 So. 2d 239.

We are of the further opinion that this case does not come within the rule announced by this Court in Brooks v. State, 209 Miss. 150, 46 So. 2d 94, because there is no substantial basis upon which it can be said that the appellant's counsel in this trial were so inadequate that they permitted a judicial farce to be accomplished. These three attorneys, namely, a Mississippi lawyer and two others out of New York City, possess high literary and legal attainments, and are all experienced trial lawyers. They were chosen by the appellant and he has made no complaint of inadequacy against them. A reading of this record demonstrates that their positions were at all times highly adversary in behalf of their client, and that judicial character was present in the proceedings at all times. In such circumstances, even if honest mistakes of counsel in respect to policy or strategy or otherwise occur, they are binding upon the client as a part of the hazards of courtroom battle. On this principle, compare the following cases from other jurisdictions: Woodell v. Maryland, 162 A. 2d 468 (1960); Wilson v. State, 51 N. E. 2d 848 (1943), an Indiana case;

Hendrickson v. State, 118 N. E. 2d 493 (1954), an Indiana case; People v. Robinson, 177 N. E. 2d 132 (1961), an Illinois case; O'Malley v. U. S., 285 Fed. 2d 733 (6th Cir.); Lotz v. Sacks, 292 Fed. 2d 657 (C. A. 6th Ohio); Popeko v. U. S., 294 Fed. 2d 168 (1961); U. S. v. Handy, 203 Fed. 2d 407 (3rd Cir. 1953); Arellanes v. U. S., 302 Fed. 2d 603 (C. A. 9 1962).

Moreover, the defendant without objecting to the illegally obtained evidence, proceeded to cross-examine the State witnesses as to the evidence he now claims should not have been admitted so as to fully develop all the facts. He also introduced the same evidence by his own witnesses including photographs of the interior of the car. We are, therefore, of the further opinion that the admission of such evidence, unlawfully obtained, if error, was cured by the introduction of the same testimony by the defendant and he is estopped to complain that such evidence was erroneously admitted in the trial for the consideration of the jury. Prine v. State, 158 Miss. 435, 130 So. 687; Weatherford v. State, 164 Miss. 888, 143 So. 853; Smith v. State, 166 Miss. 893, 144 So. 471; Musslewhite v. State, 212 Miss. 526, 54 So. 2d 911; Spivey v. State, 212 Miss. 648, 55 So. 2d 404; Barnes v. State, 164 Miss. 126, 143 So. 475; Sykes v. City of Crystal Springs, 216 Miss. 18, 61 So. 2d 387.

V.

We do not believe that there is any merit in the contention of appellant that the evidence is insufficient to support a verdict of guilty. The defense offered by appellant was an alibi, and we are of the opinion that such evidence was a question for the determination of the jury. Prisock v. State, — Miss. —, 141 So. 2d 711; Cobb v. State, 235 Miss. 57, 108 So. 2d 719; Passons v. State, 239 Miss. 629, 124 So. 2d 847.

Judgment—Supreme Court of Mississippi

The former judgment reversing this case for a new trial is hereby set aside and a judgment will be entered affirming the judgment and sentence of the Circuit Court. The judgment of the lower court is therefore affirmed.

Suggestion of error sustained, former opinion withdrawn and new opinion rendered affirming judgment of lower court.

All justices concur.

Judgment—Supreme Court of Mississippi

FRIDAY, JULY 12, 1963, COURT SITTING

No. 42,652

AARON HENRY,

vs.

STATE OF MISSISSIPPI.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be sustained doth order and adjudge that said suggestion of error be and the same is hereby sustained, the former opinion withdrawn, a new opinion entered, and the following entered as the final judgment in this cause affirming the case, To-wit: This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Bolivar County, Second District, and this Court having sufficiently examined and considered the same and being of the opinion that there is

no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 20th day of November 1962—a conviction of disorderly conduct under Section 2089.5 of the Mississippi Core of 1942 Recompiled and a sentence to pay a fine of $250.00 and costs and to serve a term of 60 days in jail—be and the same is hereby affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant, Aaron Henry, and Dr. E. P. Burton and Rev. Isaac Daniel, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.